Re-evaluating the exclusion of psychopathy from the mental disorder defence in Scots law

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Abstract

The insanity defence in Scots law was recently reformed and replaced by a statutory defence which expressly excludes psychopathy, insofar as this might form the sole basis of a plea. The Scottish Parliament closely followed the recommendations of the Scottish Law Commission, which justified the exclusion partly by reference to its own definition of psychopathy. This definition drew from, but simplified, features from a range of clinical psychiatric perspectives. In this paper I examine the Commission's portrayal of psychopathy, and argue that it represents an oversimplification of a complex and evolving scientific understanding. I also argue that scientific evidence supports the possibility that some members of the excluded group lack capacity for criminal responsibility, a possibility that is obscured by this oversimplification. In light of this examination, I make some recommendations for policy-related discussion in this area: first, greater attention ought to be paid to scientific research; second, more complex responsibility-related issues are at play than the Commission recognises, and which invite closer scrutiny; and third, greater consideration should be given to non-responsibility-related issues pertinent to whether psychopathic persons ought to be given access to such a defence.

A. Introduction

The insanity defence in Scots law was reformed fairly recently, and replaced by the defence in s.51A of the Criminal Procedure (Scotland) Act 1995 (henceforth "CPSA"). The new law, which was inserted by s.168 of the Criminal Justice and Licensing (Scotland) Act 2010 and came into force in June 2012, included an explicit exclusion for one class of personality disorders ("PD"s): any PD "characterised solely or principally by abnormally aggressive or seriously irresponsible conduct" could not form the sole basis of a plea.[1]

This exclusionary phrase, stated in the explanatory notes to the CPSA to apply "only to psychopathic personality disorder",[2] follows precisely the wording recommended by the Scottish Law Commission (henceforth "SLC" or "Commission") in its 2004 *Report on Insanity and Diminished Responsibility* (henceforth "*Report*").[3] The Commission also stated that this phrase meant "psychopathic personality disorder" or "psychopathy".[4] The Commission's

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[1] s.51A(2).

[2] Explanatory notes, para 707.

[3] Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scot Law Comm No.195, 2004), p.78.

[4] *Report* (fn.3) para. 2.62.

exclusion of psychopathy was achieved via two main strategies: first, it provided its own definition of psychopathy, departing from and simplifying the features of a range of clinical psychiatric disorders; second, it attempted to justify the exclusion by reference to responsibility-related considerations alone.

More will be said about the Commission's perspective on psychopathy shortly. The second strategy, though, is hardly unusual, and is a standard approach in this territory. As Dixon J commented in the Australian High Court case of *R v Porter*, which the Commission refers to:

> it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.[5]

He then added that, due to this, the task of defining "classes of people who should not be punished", despite the fact that they have acted in criminally proscribed ways, "is quite a different object to that which the medical profession has in view or other departments of the law have in view".[6]

But what if the class is extremely difficult to define? Some simplification, in such a case, is perhaps unavoidable, and may also be desirable given the legal as opposed to clinical concerns at hand; but there is inevitably a danger of oversimplification. Risk of oversimplification may also be heightened, in the case of "psychopathy", by the emotionally-charged nature of the subject matter. Persons with broadly-"antisocial" PDs commit a large number of criminal offences, including violent offences, and "psychopath" is of course a term of abuse. To quote Dixon J again, this class appears to exemplify the very "dangerous and vicious people" the criminal law attempts to protect society from.[7]

In this paper I express some sympathy with the Commission's portrayal of psychopathy, but argue that this is an oversimplification. I do this by providing a clinical overview of the main broadly-"antisocial" PDs in adults (Section B(2) below), and contrasting this with the Commission's perspective on psychopathy (which, to avoid confusion, I call "SLC-psychopathy") (Section B(3)). I also examine studies in empirical moral psychology supportive of the possibility that some members of this diverse and problematic group lack capacity for criminal responsibility (Section C). This possibility is then supported by reference to one of the Commission's own examples of a successful defence (Section D).

This paper draws insights from non-legal disciplines and applies these to primarily legal issues. Because the result is a discourse that is somewhat "between" disciplines, it could perhaps be described as an "interdisciplinary" paper. The analysis, however, leads to conclusions with implications for law and policy. It may be appropriate, for example, to enable

[5] *R v Porter* (1933) 55 CLR 182 at 186.
[6] *R v Porter* (fn.5) at 187.
[7] *R v Porter* (fn.5) at 186.

psychopaths to access the new defence where psychopathy is the only mental disorder in question; but many other, broader, issues are raised by this paper. A proper exploration of these various issues is beyond the scope of this paper; they are merely highlighted in Section D. Rather, the goal of this paper is to show, by means of a more detailed and rigorous analysis than that provided by the SLC, that these issues should be taken seriously. The terrain is more complex than supposed by the SLC, and the exclusion of psychopathy may be inappropriate.

I begin in Section B(1) by outlining the new defence, and the mechanism of exclusion of psychopathy.

B. The mental disorder defence, and relationship with psychopathy

(1) Outline of the mental disorder defence, and the mechanism of exclusion of "psychopathy"

As noted above, the reformed insanity defence is contained in s.51A of the CPSA. As regards the title of the defence, the SLC wished to depart from the term "insanity defence" due to the stigmatising associations of the term "insanity";[8] it did not, however, suggest a new title, an omission that was not remedied by the Scottish Parliament.[9] Here I use the term "mental disorder defence" (and sometimes just "new defence") as a shorthand.[10]

Under the mental disorder defence, an accused is "not criminally responsible for conduct constituting an offence, and is to be acquitted of the offence, if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct" (s.51A(1)). This retains the general form of the old insanity defence in Scots law: this required, first, that the accused experienced the effects of a disorder at the time of the alleged offence and that, second, this caused a "total alienation of reason" with respect to the act in question.[11] The second part of the old defence, though, has now been substituted with an "appreciation" requirement.

The meaning of "appreciation" in the new defence can be illuminated by contrast with the meaning of "knowledge" in the M'Naghten Rules. These Rules, which form the basis of the insanity defence in English law, hold that a defendant is presumed to have been sane unless a jury is satisfied that they did not (inter alia) "*know* the nature and quality of the act" or that it

[8] *Report* (fn.3) paras 2.19-2.24.

[9] See also G Maher, "The new mental disorder defences: Some comments" (2013) Scots Law Times 1, 1.

[10] The SLC also expressed concern about the use of the term 'mental disorder defence' as a shorthand: this, it was suggested, might misrepresent the nature of the defence, given that "mental disorder" only forms one component (i.e. the reason for a finding of *non-responsibility*), and cause confusion due to the use of "mental disorder" elsewhere in the CPSA (Report 2.21-22. See also Maher 2013 (fn.9) 1). Notwithstanding this, given the unwieldy official full title of the defence, "Criminal responsibility of persons with mental disorder", I refer to it here as the "mental disorder defence".

[11] *Brennan v HM Advocate* 1977 JC 38 at 43; see also *MacKay v HM Advocate* [2017] HCJAC 44; 2017 G.W.D. 21-344, at [23].

was "wrong".[12] A common criticism of "knowledge" as a criterion here is that it is unfairly narrow: a defendant might possess this knowledge at the time of an alleged offence in a "thin" or "narrow" way, but fail to grasp its meaning in a broader sense that could, in the context, undermine their capacity for responsibility.[13] Consequently, the SLC opted for the term "appreciate", in line with other jurisdictions such as Canada, as this connoted "something wider than simple knowledge" and included "a level of (rational) understanding".[14]

The SLC provided two examples to illustrate this concern.[15] In one, a schizophrenic mother smothers her children because she delusionally believes this is the only way to free them from demonic possession. In the M'Naghten sense, she "knows" the nature and quality of what she is *physically* doing and cannot therefore succeed with such a defence;[16] in a broader sense, however, she fails to appreciate the true nature of her actions in that particular context (i.e. that the demonic possession is a delusion) and therefore, in the Commission's view, should be entitled to a defence.

In the second example, a severely clinically depressed mother kills her children because she delusionally believes this will protect them from her own terrible parenting. In this case, as per the M'Naghten Rules, she "knows" that her actions are both legally[17] and morally "wrong"; again, though, she fails to appreciate the broader meaning and significance of this knowledge in a way that makes a defence appropriate. I shall say more about the SLC's analysis of this example later, as this has implications for the access of psychopaths to the mental disorder defence.

Notably, the SLC's perspective on "appreciation" is consistent with how the term has been interpreted by Scottish courts. In the recent appeal case of *MacKay v HM Advocate*,[18] it was accepted that the concept of "appreciation" was, as the SLC had argued, broader than mere "knowledge".[19] Moreover, the Commission's approach to the assessment of "appreciation" was endorsed: Lord Carloway, delivering the opinion of the High Court of Justiciary, remarked that an inability to appreciate the nature or wrongfulness of conduct "can...cover an inability to conduct oneself in accordance with a rational and normal understanding".[20] This is discussed further in Section D below.

The scope of mental disorders qualifying for the new defence includes PDs *in general*. This is due to the CPSA's adoption of the broad definition of "mental disorder" in the Mental Health

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[12] *Daniel M'Naghten's Case* (1843) 10 Clark & Finnelly 200 (HL), per Lord Tindal CJ at 210 (my emphasis).

[13] *Report* (fn.3) paras 2.42-2.51.

[14] *Report* (fn.3) paras 2.47.

[15] *Report* (fn.3) para. 2.45-46.

[16] See *R v Codère* (1917) 12 Cr App Rep 21 (CA) at 27, where it was held that "knowledge of nature and quality" meant knowledge of the physical aspects of one's actions. This position was reiterated more recently in *Sullivan*, where it was held that lack of knowledge of the "nature and quality" of the act meant merely that the accused "did not know what he was doing" (*R v Sullivan* [1984] AC 156 (HL) per Lord Diplock at 173).

[17] See *R v Windle* [1952] 2 Q.B. 826 (CA), where it was held that "wrong" in the M'Naghten Rules meant *legally* wrong. This was reaffirmed, more recently, in *R v Johnson* [2007] EWCA Crim 1978; [2008] Crim LR 132.

[18] *MacKay v HM Advocate* [2017] HCJAC 44; 2017 G.W.D. 21-344.

[19] *MacKay* (fn.18) at [27].

[20] *MacKay* (fn.18) at [30].

(Care and Treatment) (Scotland) Act 2003:[21] s.328(1) of the 2003 Act defines "mental disorder" to include mental illnesses, learning disabilities and PDs "however caused or manifested". The SLC, though, recommended excluding one class of PDs, namely those "characterised solely or principally by abnormally aggressive or seriously irresponsible conduct" (s.51A(2)).[22]

This phrase, the Commission clarified, was intended to refer to "psychopathy" or "psychopathic personality disorder" (terms the SLC used interchangeably).[23] Its use was justified by reference to English[24] and to an extent Scots law. As regards the latter, for example, in *Reid v Secretary of State for Scotland* Lord Lloyd of Berwick accepted that the appellant was "suffering from a 'persistent and permanent mental disorder' characterised by 'abnormally aggressive and seriously irresponsible behaviour'", before adding: "In other words he is a psychopath".[25] The Commission acknowledged that the expression "may be criticised from a psychiatric perspective as focusing on only some aspects of the disorder", but defended its adoption on the grounds that it was "clearly understood to mean psychopathy".[26] This was later reiterated in the explanatory notes to the CPSA, which state that s.51A(2) "applies only to psychopathic personality disorder".[27]

It is important to recognise that "psychopathic personality disorder" was used by the SLC in a non-clinical way to refer to a range of clinical disorders. In the Discussion Paper preceding the *Report*, for example, the Commission used "psychopathy" and "anti-social personality disorder" interchangeably;[28] in the *Report*, the SLC acknowledged its previous use of the term "anti-social personality disorder" but preferred the terms "psychopathic personality disorder" or "psychopathy".[29] Treating the various clinically recognised "antisocial personalities" as essentially the *same*, for the purposes of the mental disorder defence, is a key strategy adopted by the Commission. As I later critique this strategy, and argue that these disorders are not *necessarily* the same in this legal respect, it is helpful to initially provide a brief overview of this clinical terrain.

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[21] s.307 CPSA.

[22] Note, though, that the Commission was prepared to accept that members of this class could be regarded as personality disorders (*Report* (fn.3) para. 2.61). The mechanism of exclusion, then, is in contrast to that adopted in the American Law Institute's Model Penal Code: in s.4.01(2) it is stated that "mental disease or defect" does not include "an abnormality manifested only by repeated criminal or otherwise antisocial conduct". Although the wording is slightly different to that employed by the SLC, the phrase is considered to exclude psychopathy (*Report* (fn.3) para. 2.59).

[23] *Report* (fn.3) paras 2.57–2.62.

[24] Prior to repeal by the Mental Health Act 2007, the Mental Health Act 1983 defined "psychopathic disorder" as a "persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned" (s.1(2)).

[25] [1999] 2 A.C. 512 at 515 per Lord Lloyd of Berwick. Referred to by SLC, *Report* (fn.3) para. 2.62.

[26] *Report* (fn.3) para. 2.62.

[27] Explanatory notes, para. 707.

[28] e.g. Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility* (Scot Law Com DP No 122, 2003) para. 2.52.

[29] *Report* (fn.3) para. 2.58.

(2) Clinical overview of the main "antisocial personalities" in adults

A number of "antisocial personalities" are recognised as disorders, clinically, in adults. The three main recognised conditions are: antisocial personality disorder (henceforth "ASPD") in the DSM-IV and DSM-5[30] classification systems,[31] dissocial personality disorder (henceforth "DPD") in the ICD-10 classification system,[32] and psychopathy as diagnosed by the Psychopathy Checklist-Revised (henceforth "PCL-R psychopathy").[33] The PCL-R lacks the "official" status of the DSM and ICD classifications, but is nevertheless used widely.[34]

The fact that these diagnoses have significantly overlapping symptoms can be confusing. Most people, for example, who score highly on the PCL-R also meet the criteria for ASPD; the converse, however, is not true – most people who meet the criteria for ASPD do not meet the criteria for PCL-R psychopathy. For practical purposes PCL-R psychopathy can be considered a more "extreme" or "severe" subset of ASPD, and researchers sometimes describe individuals meeting the criteria for ASPD "plus" or "minus" those for PCL-R psychopathy.[35] It is important, therefore, to consider these PDs separately.

PCL-R psychopathy is a reasonable place to start with this overview, if only because the criteria are more extensive and detailed than those of either ASPD or DPD. The PCL-R was developed by the psychologist Robert Hare in the late 20th century,[36] and was significantly influenced by Hervey Cleckley's theory of psychopathy.[37] Cleckley, a U.S. Psychiatrist working around the mid-20th century, proposed that psychopathy was characterised, among other things, by a severe emotional (or affective) impairment, evident in traits such as emotional shallowness and insensitivity to the emotions of others due to lack of empathy. This affective impairment, he argued, was associated with behavioural features, such as antisocial or criminal behaviour, and a "mask of sanity" (or facade of normality).[38]

Most of the affective, behavioural, and personality features suggested by Cleckley are present, subject to some refinements,[39] in the PCL-R test (see Table 1). Most have been divided,

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[30] The American Psychiatric Association is now utilising Arabic, rather than Roman, numerals to signify sequential revisions of its diagnostic and statistical manuals.

[31] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR)*, 4th edn (Washington: American Psychiatric Press, 2000); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, 5th edn (Washington: American Psychiatric Press, 2013).

[32] World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (Geneva: World Health Organization, 1992).

[33] R D Hare, *The Psychopathy Checklist-Revised* (Toronto: Multi-Health Systems, 1991); R D Hare, *The Psychopathy Checklist-Revised*, *2nd edn* (Toronto: Multi-Health Systems, 2003).

[34] For an overview, see A Forth, S Bo and M Kongerslev, "Assessment of psychopathy: The Hare Psychopathy Checklist measures" in K A Kiehl and W P Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (New York: Oxford University Press, 2013) 5.

[35] See, for example, S Gregory, R J Blair, D Ffytche et al, "Punishment and psychopathy: A case-control functional MRI investigation of reinforcement learning in violent antisocial personality disordered men" (2015) 2 Lancet Psychiatry 153.

[36] e.g. R D Hare, "A research scale for the assessment of psychopathy in criminal populations" (1980) 1(2) Personality and Individual Differences 111.

[37] H Cleckley, *The mask of sanity: An attempt to clarify some issues about the so-called psychopathic personality*, 5th edn (St. Louis: Mosby, 1976).

[38] C J Patrick, "Antisocial personality disorder and psychopathy" in D W O'Donohue, K A Fowler and S O Lilienfeld (eds), *Personality disorders: Toward the DSM-V*, (Sage Publications, 2007), p.109, pp.112-115.

[39] For discussion of some of the changes made, see for example Hare (fn.36).

by the statistical technique of factor analysis,[40] into two main groupings: Factor 1, containing mostly personality- and affect-related items, and Factor 2, containing mostly items relating to antisocial and criminal behaviour; the two main Factors have also been divided via factor analysis into smaller "facets", as shown in the Table.[41] Each of the 20 items is scored by an interviewer, with the assistance of institutional and criminal records, on a 3-point scale ranging from "0" to "2". For most items "0" means "not present", "1" means "somewhat present", and "2" means "definitely present".[42] Thus, the maximum possible score is 40.

Factor 1: interpersonal/affective	
Facet 1: interpersonal	**Facet 2: affective**
1. Glibness/superficial charm	6. Lack of remorse or guilt
2. Grandiose sense of self-worth	7. Shallow affect
4. Pathological lying	8. Callous/lack of empathy
5. Conning/manipulative	16. Failure to accept responsibility

Factor 2: social deviance	
Facet 3: lifestyle	**Facet 4: antisocial**
3. Need for stimulation	10. Poor behavioural controls
9. Parasitic lifestyle	12. Early behaviour problems
13. Lack of realistic goals	18. Juvenile delinquency
14. Impulsivity	19. Revocation of conditional release
15. Irresponsibility	20. Criminal versatility

No factor
11. Promiscuous sexual behaviour
17. Many short-term relationships

Table 1: PCL-R factors, facets and items[43]

Several items, particularly the "antisocial" items in Facet 4, refer to criminal behaviour, overtly within the item name (item 20) and/or in the associated clinical description. From a clinical perspective this is not necessarily problematic: as Skeem and Cooke argue, this behaviour can be viewed as a "downstream correlate" of features more central to

[40] Very roughly, factors represent a distillation of correlations between variables. In the case of psychological tests, variables are test items; scores on some items may covary, and factors are postulated to explain this covariance (see, for example, P Kline, *An easy guide to factor analysis* (London: Routledge 1994)).

[41] Both factors have subsequently been divided again by factor analysis, so the model is sometimes referred to as the "four factor model" (Forth et al. (fn.34) at 8).

[42] Forth et al. (fn.34) 6.

[43] Adapted, with permission, from R D Hare, "Psychopathy, the PCL-R, and criminal justice: Some new findings and current issues" (2016) 57(1) Canadian Psychology 21, 23 (Table 1 and *Note*).

psychopathy.[44] In this regard, items in Factor 1, particularly the "affective" items in Facet 2, are sometimes considered the "core" features of psychopathy, even if in practice criminal behaviour may represent the main (if not the only) source of evidence used for the scoring of these items.[45] From the perspective of the criminal justice system, however, this is (unsurprisingly) highly problematic, as the Court of Criminal Appeal pointed out in the English case of *R v Dowds*.[46] For criminal courts, it is vital that evidence of criminal behaviour is more than *merely* evidence of this behaviour. It must point to something else, and in the context of an insanity plea shed light on the *responsibility* of the accused.[47] This is the focus of Section C below (i.e. responsibility-relevant correlates of psychopathy).

As regards the PCL-R scoring system, a score of 30 or more is recommended as a threshold or cut-score for a diagnosis of psychopathy, although it has been argued that 25 should be used in Europe, including Scotland, due to cultural differences.[48] It is probably best, though, to view this "threshold" as a pragmatic, and somewhat arbitrary, way to designate certain individuals as "highly psychopathic", rather than a means of identifying persons different in *kind* to those scoring less than the threshold. Evidence suggests that psychopathy is best thought of in dimensional, rather than categorical, terms.[49] In other words, most people have at least some psychopathic traits whereas some, occupying the extreme end of a trait-spectrum, possess much more pronounced psychopathic traits; and while they may *seem* very different to those lower on the scale, they are merely different by degree.

The criteria for ASPD, in contrast to PCL-R psychopathy, are predominantly behavioural. In both DSM-IV and 5 (where the criteria remain unchanged) 15 criteria are included. These mostly describe forms of adult antisocial behaviour, but also include a requirement for conduct disorder.[50] Conduct disorder can be viewed as a possible childhood developmental precursor to ASPD; PCL-R psychopathy includes, somewhat similarly, the criterion of "juvenile delinquency", although this is not a diagnostic requirement.[51]

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[44] J L Skeem and D J Cooke, "Is criminal behavior a central component of psychopathy? Conceptual directions for resolving the debate" (2010) 22(2) Psychological Assessment 433; but see also R D Hare and C S Neumann, "The role of antisociality in the psychopathy construct: Comment on Skeem and Cooke (2010)" (2010) 22(2) Psychological Assessment 446.

[45] T A Widiger, "Psychopathy and DSM-IV psychopathology" in C J Patrick (ed), *Handbook of psychopathy* (Guilford Press 2006), p.156, pp.160-1.

[46] *R v Dowds* [2012] EWCA Crim 281; [2012] 1 W.L.R. 2576 at [31].

[47] I set aside here the use of the PCL-R as a risk assessment tool (see e.g. A M Leistico, R T Salekin, J Decoster et al, "A large-scale meta-analysis relating the Hare measures of psychopathy to antisocial conduct" (2008) 32 Law and Human Behavior 28).

[48] D J Cooke and C Michie, "Psychopathy across cultures: North America and Scotland compared", (1999) 108(1) Journal of Abnormal Psychology 58; D J Cooke, C Michie, S D Hart et al., "Assessing psychopathy in the UK: Concerns about cross-cultural generalisability", (2005) 186 British Journal of Psychiatry 335. Forth et al. comment that in Europe the "tradition among practitioners and researchers has been to use a lower cut-off score, often 25" (fn.34, 8).

[49] J F Edens, D K Marcus, S O Lilienfeld et al., "Psychopathic, not psychopath: Taxometric evidence for the dimensional structure of psychopathy" (2006) 115 Journal of Abnormal Psychology 131.

[50] Two additional criteria are a minimum age of 18, and a 'comorbidity' condition whereby the symptoms must not occur 'exclusively during episodes of schizophrenia or mania' (DSM-5 (fn.31) 659).

[51] For an in-depth recent review of theorised childhood precursors of both ASPD and PCL-R psychopathy, see P J Frick, J V Ray, L C Thornton et al., "Can callous-unemotional traits enhance the understanding, diagnosis, and treatment of serious conduct problems in children and adolescents? A comprehensive review" (2014) 140 Psychological Bulletin 1.

The reasons for the behavioural focus of the ASPD criteria are historical, dating back to the development of DSM-III in the 1970s. At that time there was significant concern about the reliability of DSM diagnoses, and more explicit behavioural criteria, with less scope for subjective clinical judgment, were seen as a way to address this issue.[52] Later, prior to the introduction of DSM-IV, calls to make ASPD less behaviourally-focused again led to clinical field trials in which the DSM-III criteria were compared to an abbreviated version of the PCL-R test;[53] the trials, however, provided somewhat mixed evidence to support such a change, and the behavioural focus was retained.[54]

One factor contributing to the field trial results was environmental. The DSM is designed for use, primarily, in normal clinical contexts, whereas the PCL-R (and, by extension, its abbreviated version) is designed for use in prison and forensic psychiatric settings.[55] In normal clinical settings, the ASPD criteria appear reasonably capable of identifying persons with the personality and affective features of psychopathy;[56] indeed, while these features are missing from the ASPD criteria, many are presented as "associated features" in DSM-IV and -5 manuals. In prison and forensic psychiatric settings, though, where criminality is common, the ASPD is largely non-specific with respect to psychopathic traits. Roughly 50-80% of prison inmates meet the criteria for ASPD, while in contrast only 15% of inmates score highly on the PCL-R.[57] This is why it is helpful, in this population, to know whether someone meeting the criteria for ASPD also scores highly on the PCL-R.

The DPD criteria are something of a halfway-house between those for ASPD and PCL-R psychopathy. They include some of the affective and personality features seen in Factor 1 of the PCL-R, and some but not all of the antisocial/criminal behavioural criteria seen in ASPD and PCL-R Factor 2.[58] The lengthy DPD criterion "gross and persistent attitude of irresponsibility and disregard for social norms, rules and obligations", for example, is similar to ASPD criteria as well as some in PCL-R Factor 2; the DPD criterion "callous unconcern for the feelings of others", however, is only present in the PCL-R (item 8, "callous/lacking empathy") and is missing as an explicit ASPD criterion.[59] Also, like the PCL-R but unlike the ASPD criteria, there is no requirement for a diagnosis of conduct disorder.[60]

With this brief clinical overview in mind, I now examine the SLC's approach to what it calls "psychopathy" more closely.

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[52] Patrick (fn.38) 115-7.

[53] T A Widiger, R Cadoret, R Hare et al, "DSM-IV antisocial personality disorder field trial" (1996) 105 Journal of Abnormal Psychology 3.

[54] Widiger et al. (fn.53); see also C Crego and T A Widiger, "Psychopathy and the DSM" (2015) 83 Journal of Personality 665, 668-669.

[55] Crego and Widiger (fn.54) 668-9.

[56] Crego and Widiger (fn.54) 668.

[57] J.R. Ogloff, 'Psychopathy/antisocial personality disorder conundrum', (2006) 40(6-7) Australian and New Zealand Journal of Psychiatry 519. These figures are mostly based on U.S. data.

[58] Ogloff (fn.57) 521.

[59] This symptom is mentioned, however, in the "associated features" section of both DSM-IV and DSM-5: "Individuals with Antisocial Personality Disorder frequently lack empathy and tend to be callous, cynical, and contemptuous of the feelings, rights, and sufferings of others" (DSM-IV (fn.31) 647; DSM-5 (fn.31) 660).

[60] ICD-10 (fn.32) 159.

(3) "Psychopathy" as understood by the Commission

As noted at the end of Section B(1), the term "psychopathy" or "psychopathic personality disorder" was used by the SLC to refer to a range of clinical disorders. In the Discussion Paper, "anti-social personality disorder" (ASPD) was mentioned, and treated as interchangeable with "psychopathy";[61] in the *Report* the Commission added "dissocial personality disorder" (DPD) to the list.[62] PCL-R psychopathy could also have been mentioned, but the Commission did not attempt an exhaustive list. These various disorders are then taken to refer, for the purposes of the SLC, to the same subject matter, which the SLC referred to in the *Report* as either "psychopathy" or "psychopathic personality disorder".

It is necessary to consider the SLC's interpretation of psychopathy further because, as we have already seen, various terms for broadly "antisocial" personalities are in play and there is scope for confusion (e.g. do I mean *clinical* psychopathy or psychopathy as defined by the SLC?). I refer to the SLC's take on psychopathy, therefore, as "SLC-psychopathy". SLC-psychopathy is not a clinical construct, but a representation of what the Commission thought were the responsibility-relevant features of the whole range of adult "antisocial" PDs. As the Commission put it, its concerns were "not…with the disposal of such persons within the criminal justice system", or "with issues in the civil law" or "medical…treatment and care of psychopaths", but with "the relationship between the defence based on an accused's mental disorder and psychopathy".[63]

Let us, then, examine SLC-psychopathy further. A few excerpts from the final *Report*, which may be regarded as more "definitive" of the SLC's view, help to illuminate the main features:

> In most general terms the condition is associated with forms of anti-social (including criminal) behaviour by a person who cannot apply, or is indifferent about applying, normal moral standards and feelings to his actions.[64]

> Psychopathy does not have the effect that the person's reasons for acting as he did are in any way 'abnormal' or 'crazy' or 'disordered.' Rather, psychopathic personality disorder has the effect that because of the psychological make-up of the accused he has difficulties, not shared by the ordinary person, in complying with the requirements of the law.[65]

> He appreciates what he is doing. At most such a person has difficulties in controlling his conduct but it cannot be said that a psychopath is completely lacking in volitional capacity.[66]

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[61] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility* (fn.28) para. 2.52.
[62] *Report* (fn.3) para. 2.57.
[63] *Report* (fn.3) para. 2.58.
[64] *Report* (fn.3) para. 2.57.
[65] *Report* (fn.3) para. 2.60.
[66] *Report* (fn.3) para. 2.60.

> …psychopathy does not have the effect that a person cannot control his conduct. Its effect is to make it more difficult, but not impossible, for the person concerned to behave in a way that he knows is correct.[67]

These excerpts reveal a number of behaviours and capacities posited to typify SLC-psychopathy. First, there is "antisocial (including criminal) behaviour". This much is relatively uncontroversial, and is consistent with all three PDs outlined above. Second, there are assertions regarding (i) the reasons for action experienced by those falling into this class, (ii) the ability of these persons to control their actions, and (iii) their capacity to understand the wrongfulness of their actions. These claims are perhaps less obviously straightforward.

Consider, first, reasons for action. If a person "cannot apply, or is indifferent about applying, normal moral standards or feelings to his actions" (first excerpt), does it necessarily follow that his reasons for action are *normal* (second excerpt)? Contrary to the second excerpt, his reasons for action could be regarded as abnormal by definition, relative to people in general, provided people *ordinarily* apply the moral standards or feelings in question; and whether this person's thoughts are "crazy" or "disordered" seems to be an open question.

Second, with respect to volitional capacity, the view that SLC-psychopaths have a reduced, but nonetheless residually present, capacity to comply with the law might seem to square neatly with clinical facets of all three disorders mentioned in the last Section. In particular, criteria relating to "impulsivity" suggest persons prone to acting without giving proper thought to the consequences of their actions, or despite recognising that they should not act in the way that they do.[68] This potentially responsibility-relevant property of SLC-psychopaths, however, is something of a red herring because the proposed defence (now enacted) lacks a volitional component.[69]

Third, and most importantly for the purposes of the reformed defence, SLC-psychopaths understand the wrongfulness of their actions. Such a person "*appreciates* what he is doing", and is unable to act "in a way that he *knows* is correct".[70] The "normal moral standards or feelings" that this person "cannot apply, or is indifferent about applying" (mentioned in the first excerpt) are present in the background; they are a normal backdrop against which the aforementioned partial volitional impairments manifest. Thus, such a person could not hope to succeed with a mental disorder defence.

This last issue is the focus of Section C, where I consider whether some persons within the spectrum of broadly "antisocial" PDs could lack an ability to "appreciate the nature or wrongfulness" of allegedly criminal conduct.

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[67] *Report* (fn.3) para. 2.60.

[68] For example, in the DPD criteria, "very low tolerance to frustration and a low threshold for discharge of aggression…" (ICD-10 (fn.32) 159); in the ASPD criteria, "Impulsivity or failure to plan ahead" (DSM-5 (fn.31) at 659); and in the PCL-R criteria, "impulsivity" (Forth et al. (fn.34) 7).

[69] *Report* (fn.3) para. 2.52-6. This is in contrast, for example, to the Model Penal Code: s.4.01(1) states that an insanity defence may be available where a person "lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to *conform his conduct to the requirements of law*" (emphasis added).

[70] *Report* (fn.3) para. 2.60 (emphasis added).

C. Could some SLC-psychopaths be excluded inappropriately?

Two main scientific hypotheses attempt to explain the inclination of persons with broadly "antisocial" PDs towards breaching moral norms: the moral judgment hypothesis, and the moral motivation hypothesis.[71] According to the moral judgment hypothesis, these persons lack the capacity to make moral judgments. This could be for a range of reasons, including an inability to grasp moral reasons, and/or moral emotions, that ordinarily contribute to an ability to "appreciate the nature or wrongfulness of…conduct" (to use the terminology of the mental disorder defence).[72] This hypothesis is therefore particularly relevant to Scots law. The moral motivation hypothesis posits that such persons are able to appreciate moral considerations and make moral judgments, but are indifferent to the outcomes of these judgments.

In this Section, the focus is on cognition rather than motivation, given the scientific focus on cognition in this area. I also focus mainly on studies concerning the capacity of psychopathic persons to make moral judgments.[73] This discussion then provides empirical support for arguments, presented in Section D, that some psychopaths could potentially succeed with a mental disorder defence in Scots law (in the absence of the formal exclusion). The focus is also on PCL-R psychopathy (in all but the final study discussed), given the popularity of this test in cognitive neuroscientific research.[74]

A reasonable starting point is studies undertaken by Blair and colleagues in the mid-1990s concerning psychopathy and the "moral-conventional distinction".[75] Ordinarily, children learn to distinguish between moral and conventional norms and transgressions at around age three.[76] They recognise the normative difference, for example, between a harm-related ("moral") rule like "don't pull another child's hair", and an etiquette-related ("conventional") rule like "don't drink soup from a bowl". In two studies by Blair and colleagues, PCL-R psychopaths failed to distinguish between moral and conventional transgressions along one of the axes typically tested for, "authority independence". Both types of norm were rated as equally authority independent, in the sense that psychopathic participants reported that it would be "wrong" to breach these norms *even if* one were given permission to do so by an appropriate authority figure (the meaning of authority-independence in this experimental paradigm)[77]. Normally,

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[71] J Schaich-Borg and W Sinnott-Armstrong, "Do psychopaths make moral judgments?" in K A Kiehl and W P Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (New York: Oxford University Press, 2013), p.107.

[72] I remain neutral here (or at least attempt to) with respect to longstanding philosophical debates in metaethics concerning the importance of reasons and/or emotions to moral judgments.

[73] Readers are directed to the helpful review by Schaich-Borg and Sinnott-Armstrong (fn.71) for more detailed discussion, covering all but the final two studies discussed here (by Young et al. and Baskin-Sommers et al.).

[74] N E Anderson and K A Kiehl, "The psychopath magnetized: Insights from brain imaging" (2012) 16(1) Trends in Cognitive Science 52, 53 (Box 1).

[75] R J R Blair, "A cognitive developmental approach to morality: Investigating the psychopath" (1995) 57 Cognition 1; R J R Blair, L Jones, F Clark et al., "Is the psychopath `morally insane'?" (1995) 19(5) Personality and Individual Differences 741.

[76] D Kelly, S Stich, K J Haley et al., "Harm, affect, and the moral/conventional distinction" (2007) 22(2) Mind & Language 117.

[77] The paradigm was originally developed by Turiel (E Turiel, *The development of social knowledge: Morality and convention* (Cambridge: Cambridge University Press, 1983)).

only moral norms are considered to be authority-independent, so psychopathic participants appeared to be treating conventional norms *as if* they possessed the authority-independent force of moral norms (according to this paradigm, at least).

These studies generated a fair amount of academic interest, given the implication that psychopaths might not understand the difference between moral and conventional norms.[78] One worry, though, was that the results could simply have been an artefact of "impression management": psychopathic participants were all incarcerated, and treating conventional norms just as seriously as moral norms may have seemed prudent in that context (e.g. to increase the likelihood of an early release). In this regard, a more recent study by Aharoni et al., published in 2012, which used a larger sample size and a methodology modified to prevent impression-management, failed to reproduce these earlier findings.[79] No significant differences were found between psychopathic and non-psychopathic subjects with respect to the moral-conventional distinction, which was made successfully. While the methodology was not completely identical to that used in the initial studies, it was nevertheless broadly similar and it now seems unwise, pending further research at least, to place weight on the research by Blair et al.[80]

This research is a useful starting point because it illustrates the need for caution in this area, and the dangers of leaping too quickly to conclusions regarding the moral competence of psychopaths. Once is it excluded from the picture, what we are left with is perhaps less obviously relevant to the criminal responsibility of psychopaths; I will argue, though, that there are some very promising research avenues at the moment which raise the possibility that some psychopaths have an impaired ability to appreciate the nature or wrongfulness of their actions.

To set the scene for this discussion, it is helpful to first consider research involving "moral images" and "moral dilemmas". In such studies, researchers typically wish to see whether abnormal answers are provided to questions, and in studies where neuroimaging is used whether answers are accompanied by abnormal brain activity. In one study by Harenski et al., for example, subjects were required to distinguish between images containing moral and nonmoral content, and rate the severity of depicted moral violations.[81] No significant differences in responses were found between psychopathic and non-psychopathic subjects, either with respect to the distinction between moral and non-moral images, or severity ratings. Psychopathic participants, however, showed abnormal brain activity while distinguishing between moral and non-moral images, and also while rating the severity of moral violations.[82]

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[78] e.g. N Levy, "The responsibility of the psychopath revisited" (2007) 14(2) Philosophy, Psychiatry, & Psychology 129; C Fine and J Kennett, "Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment" (2004) 27(5) International Journal of Law and Psychiatry 425.

[79] E Aharoni, W Sinnott-Armstrong and K A Kiehl, "Can psychopathic offenders discern moral wrongs? A new look at the moral/conventional distinction" (2012) 121(2) Journal of Abnormal Psychology 484; for discussion, see J. Schaich-Borg and Sinnott-Armstrong (fn.71) pp.115–7.

[80] For further discussion of these differences, and a note of caution regarding their applicability to the work by Blair and colleagues, see also N Levy, "Psychopaths and blame: The argument from content" (2014) 27(3) Philosophical Psychology 351, 355-358.

[81] C L Harenski, K A Harenski, M S Shane et al, "Aberrant neural processing of moral violations in criminal psychopaths" (2010) 119(4) Journal of Abnormal Psychology 863.

[82] In non-psychopathic participants, for example, the severity-ratings of depictions of moral violation correlated with amygdala activity; this correlation was lacking in psychopathic participants. In contrast to non-

These findings largely parallel those from experiments in which subjects are presented with moral dilemmas. To appreciate this methodology, consider a so-called "trolley" moral dilemma (emblematic of this style of question): a runaway rail trolley is hurtling down a track towards a junction. Left alone, the trolley will kill five railway workers, but if you intervene and push a button, diverting the trolley onto another track, it will only cause the death of one worker. Should you press the button, thus *actively* causing someone's death, or refrain from intervening?[83] There is not necessarily a "right" or "wrong" answer, at least barring substantial moral philosophical debate (which these experiments are not designed to engage with).

In the case of psychopathy, researchers have tested whether PCL-R psychopaths provide a specific pattern of (consequentialist) responses to moral dilemmas, including a subset of particularly controversial, so-called "high conflict", moral dilemmas. The rationale is somewhat complex – the underlying hypothesis is prompted by patterns of decisions observed in patients with brain lesions in areas showing abnormally reduced activity in psychopathy.[84] In any event, findings in psychopathy have been mixed, and there is no strong support for this hypothesis.[85] Again, though, as with the study by Harenski et al., several studies have revealed abnormal brain activity while PCL-R psychopaths make moral judgments.[86]

The question, of course, is what this abnormal brain activity means. Glenn et al., who used functional magnetic resonance imaging (fMRI)[87] to study brain activity in one "moral dilemma" study, argue that this is potentially consistent with the hypothesis that PCL-R psychopaths "make use of alternative cognitive strategies" to make moral judgments, particularly where judgments involve significant emotional processing (as is usually the case with "high conflict" dilemmas, where there is often significant interpersonal disagreement).[88] In these cases, so the hypothesis goes, psychopaths could be making moral judgments via "colder", less emotion-related, cognitive mechanisms.[89]

This "differential strategies" hypothesis has close ties to Cleckley's theory of psychopathy.[90] As noted earlier, Cleckley thought that a crucial component of psychopathy was a psychological "mask", a facade created to paper-over emotional and psychological problems and enable highly psychopathic persons to function within society. Cleckley believed that many psychopaths occupied respected positions in society and that their "masks" could make an

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psychopathic participants, psychopathic participants also showed an increase in temporoparietal junction activity while making moral judgments.

[83] For a helpful discussion of these scenarios, see W Glannon, *Brain, body, and mind: Neuroethics with a human face* (Oxford: Oxford University Press, 2011), Ch.4.

[84] M Koenigs, M Kruepke, J Zeier et al, "Utilitarian moral judgment in psychopathy" (2012) 7 Social Cognitive and Affective Neuroscience 708, 709.

[85] For helpful discussion, see Schaich-Borg and Sinnott-Armstrong (fn.71), pp.117–20.

[86] Schaich-Borg and Sinnott-Armstrong (fn.71) pp.123–4.

[87] fMRI measures brain activity indirectly, by measuring localised changes in magnetic fields which occur when oxygen is utilised within the brain. When blood flow increases to an active brain area, which normally occurs via an automatic reflex, deoxygenated haemoglobin is diluted by oxygenated haemoglobin; this alters the magnetic field in this area, which is then detected by the scanner (N K Logothetis, "The underpinnings of the BOLD functional magnetic resonance imaging signal" (2003) 23(10) Journal of Neuroscience 3963).

[88] A L Glenn, A Raine, R A Schug et al, "Increased DLPFC activity during moral decision-making in psychopathy" (2009) 14(10) Molecular Psychiatry 909, 910.

[89] In this regard, see also Schaich-Borg and Sinnott-Armstrong (fn.71) pp.123–4.

[90] Schaich-Borg and Sinnott-Armstrong (fn.71) p.123.

"agreeable" or "positive" impression, even conveying "desirable and superior human qualities".[91] This idea is still very much alive in psychopathy research, and is the focus of research into so-called "successful" psychopathy.[92] But Cleckley's "mask" might also include a facade of *moral competence*, manifesting as an ability to "parrot" socially acceptable moral responses despite an inner lack of moral understanding.

As is widely acknowledged, though, this hypothesis is highly speculative and much more research is required to support it. Furthermore, the finding that brain activity is "abnormal" does not tell us anything, in itself, about the *quality* of decisions made by psychopathic persons. The studies in question only examined the substantive moral conclusions reached by subjects, and not *how* they arrived at these conclusions. In other words, the studies examined "substantive" rather than "procedural" rationality.[93] And as it is not possible to simply "read off" the content of a subject's mind from an fMRI scan, future research would need to examine the *reasons* psychopaths had for their conclusions.[94]

More promising lines of inquiry, at least at the moment, concern the sensitivity of psychopathic persons to morally-relevant information. In this regard, one recent study by Young et al. examined the extent to which PCL-R psychopaths were inclined to blame others for purely accidental harms.[95] Normally, irrespective of any moral considerations we might have, people are inclined to blame others for entirely accidental harms.[96] "Entirely" accidental, in this context, refers to harms that are neither intentional nor due to negligence on the part of the harm-causing agent; an example provided by Young et al. is accidental poisoning in circumstances where a host, making coffee for a guest, could not possibly know that a toxic substance had been substituted for sugar in a container labelled "sugar".[97] Participants in this study were presented with a range of hypothetical vignettes describing intentional, attempted, and entirely accidental harms, and asked to rate the "moral permissibility" of the described actions on a scale ranging from 0 ("morally forbidden") to 7 ("morally acceptable"). Highly psychopathic subjects (PCL-R of 30 or more out of 40) were significantly more "forgiving" of entirely accidental harms than controls, or indeed subjects with intermediate levels of psychopathy (PCL-R score 21–29). Other scenarios were rated normally.

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[91] Cleckley (fn.37) pp.338–339.

[92] e.g. P Babiak and R D Hare, *Snakes in suits: When psychopaths go to work* (New York: Harper Collins, 2007).

[93] For a helpful philosophically-minded discussion of issues in this area, including the distinction between substantive and procedural rationality, see see J Craigie and A Coram, "Irrationality, mental capacities and neuroscience" in N A Vincent (ed), *Neuroscience and legal responsibility* (New York: Oxford University Press, 2013), p.85.

[94] This effort might risk being frustrated by the very Clecklean mask it hopes to uncover: how, after all, can researchers be sure that the reasons proffered by psychopaths were the *real* reasons they had for their decisions? At the same time, though, "conversability" with a moral concept could indicate at least a minimal degree of competence with that concept (J Kennett, "Reasons, emotion, and moral judgement in the psychopath" in L Malatesti and J McMillan (eds), *Responsibility and psychopathy: Interfacing law, psychiatry and philosophy* (Oxford: Oxford University Press 2010) 243, 246-9).

[95] L Young, M Koenigs, M Kruepke et al., "Psychopathy increases perceived moral permissibility of accidents" (2012) 121(3) Journal of Abnormal Psychology 659.

[96] L Young, S Nichols and R Saxe, "Investigating the neural and cognitive basis of moral luck: It's not what you do but what you know" (2010) 1(3) Review of Philosophy and Psychology 333.

[97] Supplementary materials, available online: <http://dx.doi.org/10.1037/a0027489.supp> 4–5 (accessed 24.10.17).

Care is required when interpreting this study. Unlike the aforementioned studies involving moral images and dilemmas, psychopathic participants gave abnormal answers; but, as Young et al. point out, these responses could be regarded as *more* morally appropriate or rational. Such a response might be given if someone took time to reflect on their intuitive inclination towards blame, and suppressed this by taking account of the non-culpable mental state of the harm-causing agent. The authors argue that this apparently greater "forgiveness", though, is probably due to a reduced emotional response to the harm caused, rather than greater reflection on the harm-causing agent's mental state.[98] The theory behind this argument is that the permissibility rating reflects the balance between two conflicting cognitive processes: one that evaluates an agent's intentions, and another that evaluates the outcomes of an agent's actions. Ordinarily, according to this theory, emotional processing "wins", at least at least initially, leading to an intuitive judgment of blameworthiness (and therefore impermissibility); this part of the response, however, is significantly diminished in psychopaths, leading to a relatively unopposed evaluation of intention.[99]

This explanation is plausible, at least insofar as it is in keeping with more established facts about psychopathy. Earlier studies, for example, have demonstrated that highly psychopathic persons are less sensitive than non-psychopaths to sad and fearful faces, as well as to sad and fearful tones of voice.[100] There is also a reduced galvanic skin response (reduced electrical conductivity, due to reduced sweating) in response to observed fear, pain and sadness, consistent with a reduced empathic emotional response.[101] Furthermore, substantial fMRI and sMRI (structural magnetic resonance imaging) data supports the existence of emotional processing-related problems in psychopathy.[102]

One might perhaps question the relevance of this study to criminal law, given the importance of intentional and attempted harms in this context (which psychopaths were seemingly able to evaluate normally.[103] The study does, however, highlight the importance of emotional processing for decision-making. Moreover, it is in line with other recent research suggesting that psychopaths have difficulty incorporating the emotion of regret into decisions.[104] This research, which I now consider, is more obviously relevant to the responsibility of psychopaths.

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[98] Young et al. (fn.95) 664.

[99] Young et al. (fn.95) 660). See also F Cushman, "Crime and punishment: Distinguishing the roles of causal and intentional analyses in moral judgment" (2008) 108(2) Cognition 353.

[100] A A Marsh and R J R Blair, "Deficits in facial affect recognition among antisocial populations: A meta-analysis" (2008) 32 Neuroscience & Biobehavioral Reviews 454; A Dawel, R O'Kearney, E McKone et al, "Not just fear and sadness: Meta-analytic evidence of pervasive emotion recognition deficits for facial and vocal expressions in psychopathy" (2012) 36 Neuroscience & Biobehavioral Reviews 2288.

[101] Dawel et al. (fn.100).

[102] For a relatively recent review of work in this area, together with wider findings, see Anderson and Kiehl (fn.74).

[103] It has been argued that harm-related emotional responses may be important for moral development (e.g. R J R Blair, "The amygdala and ventromedial prefrontal cortex in morality and psychopathy" (2007) 11(9) Trends in Cognitive Sciences 387). Whether a failure of this mechanism could prevent the acquisition of moral competence, though, is highly questionable, as there may be other routes to the development of this competence (H L Maibom, "The mad, the bad, and the psychopath" (2008) 1 Neuroethics 167).

[104] A Baskin-Sommers, A M Stuppy-Sullivan and J W Buckholtz, "Psychopathic Individuals exhibit but do not avoid regret during counterfactual decision making" (2016) 113 Proc Natl Acad Sci USA 14438, 14439.

Normally, when making decisions (moral or otherwise), we take into account the potential of a contemplated course of action to engender regret. In this regard, regret is more than simply an unpleasant feeling we experience when we realise that, had we made a different choice, there would have been a better outcome; rather, the envisaged potential for regret helps us to select one option from a range of possibilities (i.e. assists with counterfactual decision-making).[105] In a study involving economic decision-making, Baskin-Sommers et al. found that despite apparently experiencing regret normally, with respect to poor decisions, psychopaths were considerably less likely to take potential for regret into account when making decision: in contrast to control participants, psychopaths predominantly relied on anticipated economic value when making decision.[106] And while this action-guiding (or "behavioural") regret-insensitivity did not appear to impair economic decision-making, the obvious topic of the study, a significant correlation was found between this regret-insensitivity in psychopathic participants and number of previous criminal incarcerations.[107]

This research further highlights the importance of emotional processing for rational decision-making in psychopathy. And in contrast to the study by Young et al., where one might question the relevance of the findings to the criminal law, emotion appears in this case to have a more critical role. These are relatively new findings and would benefit from replication (especially with the PCL-R, as a related self-report test was used[108]). Nevertheless, this study is potentially significant and, given the apparently normal emotional experience of regret (or "affective" regret) by psychopathic participants, also highlights the importance of distinguishing between the *experience* of emotions and their actual *use* in decision-making in psychopathy.

Finally, this study raises fascinating questions about sensitivity to *remorse* in psychopathy. From the behavioural economics-related perspective of Baskin-Sommers et al.'s study, regret can be characterised as a negative feeling arising from knowledge that a different choice would have caused a better result for oneself; remorse, in contrast, can be viewed as a negative feeling arising from knowledge that a different choice would have caused a better result *for others*.[109] If the results of this study also hold for remorse, a question which requires further research,[110] this could help to explain why psychopaths make such terrible decisions with respect to others as well as themselves. Research in this area, therefore, has implications extending well beyond economic decision-making.

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[105] e.g. G Coricelli and A Rustichini, "Counterfactual thinking and emotions: Regret and envy learning" (2010) 365 Philos Trans R Soc Lond B Biol Sci 241; N Camille, V A Pironti, C M Dodds et al., "Striatal sensitivity to personal responsibility in a regret-based decision-making task" (2010) 10 Cogn Affect Behav Neurosci 460.

[106] Baskin-Sommers et al. (fn.104) 14440-14441.

[107] Baskin-Sommers et al. (fn.104) 14441.

[108] The full version of the Self-Report Psychopathy-III (SRP-III) was used. Baskin-Sommers et al. discuss this test in supporting information for their paper, available here <www.pnas.org/lookup/suppl/doi:10.1073/pnas.1609985113/-/DCSupplemental> (accessed 24.10.17). See also, for example, S. Gordts, K. Uzieblo, C. Neumann et al., "Validity of the Self-Report Psychopathy scales (SRP-III full and short versions) in a community sample" (2017) 24 Assessment 308.

[109] Baskin-Sommers et al. (fn.104) 14443.

[110] Baskin-Sommers et al (fn.104) 14443.

With this scientific perspective in mind, I now return to the relationship between psychopathy and the "mental disorder" defence in Scots law.

D. Re-evaluating the exclusion

As mentioned earlier, the reason for presenting an overview of clinical perspectives of PDs, and discussing empirical moral psychology, was to assist with a critique of the Commission's strategy with respect to this problematic group. This strategy, as noted, is to treat the group as essentially identical, for the purposes of the mental disorder defence. Section B(3) outlined the main features of what was termed SLC-psychopathy ("psychopathic personality disorder" as defined by the SLC), and Section C examined research suggesting that a subgroup of SLC-psychopaths may have responsibility-relevant impairments.

To recap, in Section C it was seen that psychopaths have difficulty incorporating emotional information into morally-relevant decisions, and that emotion-sensitivity issues include the use of regret in counterfactual decision-making. This research, it was argued, supports the claim that *some* SLC-psychopaths may have responsibility-relevant impairments. Furthermore, given that psychopathy may be dimensional in nature, it is possible that at least some SLC-psychopaths may have *severe* impairments in this regard.

This research, therefore, threatens to undermine the SLC's lumping strategy with respect to "antisocial" PDs. Should the concept of SLC-psychopathy, then, be abandoned? Is it time to consider reforming the mental disorder defence, perhaps to permit at least some psychopathic persons to raise the defence?

A conservative response to this question might be to argue that while the abnormalities identified could be responsibility-"relevant", they cannot be sufficient to render psychopathic persons *incapable* of appreciating the nature or quality of allegedly criminal conduct. The research by Baskin-Sommers et al., it might be argued, at best only helps to explain why some psychopaths make bad decisions, and an accused is not entitled to a defence merely because he or she made a bad decision. Indeed, it might be added, this research only sheds light on why an SLC-psychopath might find it "more difficult, but not impossible,…to behave in a way that he knows is correct" (to quote the words of the SLC, discussed in Section B(3)). A sceptic might also cite the aforementioned research by Young et al., showing apparently normal understanding of the moral permissibility of *intentional* harms, and point to the obvious importance of "wrongful intentions" to the criminal law.

While one can be sympathetic towards this SLC-orientated perspective, it misses a deeper issue. As noted earlier, an important facet of the research by Baskin-Sommers et al. is the distinction between "affective" and "behavioural" aspects of emotional processing. Highly psychopathic participants were apparently able to experience regret normally, when it became clear that a different choice would have resulted in a better outcome for themselves; they had difficulties, however, incorporating the potential for regret into decisions. This distinction has not typically been recognised in the literature on psychopathy (both scientific and non-scientific), where the condition has traditionally been presented as one in which individuals have a "lack of" emotions like regret or remorse. But psychopaths may be able to experience

these emotions normally with regard to the outcomes of past decisions, yet unable to incorporate them into current decisions; and, moreover, this planning-related issue may correlate with real-world antisocial behaviour (as found, in this study, with number of criminal incarcerations). This, though, is also a distinction that could be made with respect to the mental disorder defence in Scots law: psychopaths may be able to "appreciate" aspects of their emotional experience, but unable to "appreciate" the weight of these emotional factors in the context of real-time decision-making.

This places us squarely within the territory of the examples provided by the SLC, mentioned in Section B(1) above. Consider, in particular, the second example, concerning a mother with severe depression who kills her children to protect them from future suffering due to her own terrible parenting. As the Commission stated, she "knows that what she is doing is at one level morally (and legally) wrong", and also "may feel considerable regret about carrying out her actions"; however, she nevertheless "considers that she has an overriding reason for doing what is otherwise wrong".[111] In terms of legal analysis, the Commission suggested that this could be viewed as a case where "mental disorder (depression) distorts her reasoning about what is right (and wrong) for her to do". It then cited, to clarify this, the aforementioned Australian case of *R v Porter*, where Dixon J remarked that the critical issue with respect to "appreciation" was whether the accused…

> …was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong.[112]

This analysis could apply to a person who was unable, due to psychopathy, to incorporate the potential for regret into a decision. It could be argued, that is, that this inability meant the accused was unable to bring a "moderate degree of sense" to bear on the decision, and that this irrationality, relative to the rationality of "ordinary people", led to the allegedly criminal conduct. In this way, arguably, psychopathy could form the sole basis of a mental disorder defence in Scots law. As noted earlier, this analysis is also consistent with the defence as it has been interpreted by Scottish courts, with the High Court of Justiciary holding in *MacKay* that "appreciation" can "cover an inability to conduct oneself in accordance with a rational and normal understanding".[113]

The findings of Baskin-Sommers et al. are of course new, and would benefit from further study and replication; indeed, the authors describe their perspective as an "alternative viewpoint" which currently "merits consideration".[114] Their research, however, exposes a problem with the SLC's strategy: SLC-psychopathy represents a fixed and conceptually-closed

[111] *Report* (fn.3) para. 2.46.
[112] *R v Porter* (fn.5) at 189–90.
[113] *MacKay* (fn.18) at [30].
[114] Baskin-Sommers (fn.104) 14441.

simplification of clinical perspectives of psychopathy, and is inevitably hostage to scientific developments that fail to fit. And because this simplification has formed the basis of the exclusion in s.51A(2) of the CPSA, the statutory defence is also at odds (actually or potentially) with these developments.

One solution to this problem might be for a creative re-interpretation, by the criminal courts, of the phrase "characterised solely or principally by abnormally aggressive or seriously irresponsible conduct". It could be argued, for example, that emerging evidence concerning "regret" shows that in at least some cases psychopathy is characterised neither "solely" nor "principally" by "abnormally aggressive or seriously irresponsible conduct", and that some psychopaths should be permitted to raise the defence on this basis. The phrase, however, is stated to refer to "psychopathy" as a category in both the explanatory notes to the Act and by the SLC; there is also the policy-related issue that the SLC has provided a restrictive interpretation of the responsibility-relevant features of this group.

The problems with the SLC's strategy may indeed be twofold. On the one hand, some degree of simplification and generalisation is required to facilitate legal and policy-based analysis of a subject matter as heterogeneous as the "antisocial" PDs. As the Commission correctly states, the topic of "psychopathy" is controversial across various disciplines, and there is no established terminology (as seen, in Section B(2) above, with respect to ASPD, DPD and PCL-R psychopathy).[115] But this raises the question of how much simplification is appropriate, given that oversimplification may misrepresent the subject matter (which, I have argued by reference to research in empirical moral psychology, may be the case). On the other, the Commission committed itself to determining the right of access of this complex class of persons to the mental disorder defence by reference to responsibility-based considerations *alone* (as noted in Section B(3) above). And as we have seen, when one considers the emerging science in this area, it may be difficult to distinguish between the responsibility-relevant features of at least some psychopaths and those relevant in one of the Commission's own examples of a successful mental disorder defence.

It may, of course, be possible to find ways to distinguish between these cases without leaving the domain of responsibility theory. This, though, would entail a much more thorough analysis than presented in the *Report* or the preceding Discussion Paper. This analysis would also risk generating more heat than light, as this is an ongoing and rather fraught area of philosophical debate.[116] In the end, the Commission may have erred on the side of oversimplification, given that this is capable of providing a reasonably clear, and pragmatically workable, policy.

[115] *Report* (fn.3) para. 2.57.

[116] e.g. S J Morse, "Psychopathy and criminal responsibility" (2008) 1(3) Neuroethics 205; A Duff, "Psychopathy and answerability" in L Malatesti and J McMillan (eds), *Responsibility and psychopathy* (Oxford: Oxford University Press, 2010) p.199; K Levy, "Dangerous psychopaths: Criminally responsible but not morally responsible, subject to criminal punishment and to preventive detention" (2011) 48 San Diego Law Review 1299; P Litton, "Criminal responsibility and psychopathy: Do psychopaths have a right to excuse?" in K A Kiehl and W P Sinnott-Armstrong (eds), *Handbook on psychopathy and law* (Oxford: Oxford University Press, 2013) p.275.

What, then, can be taken from this discussion? I would suggest the following general points, with the goal of improving future legal and policy debate in this area. First, it should be recognised that what the Commission called "psychopathy" is an evolving topic that is considerably more complex than represented in the *Report*, and that there is a risk of oversimplification in this area.

Second, a more scientifically-informed take on "psychopathy" raises significant responsibility-related questions that can be obscured by an oversimplified, overgeneralised, approach to the topic. I have only raised this issue here briefly, with respect to the mental disorder defence, by suggesting that the Commission's own analysis may apply to a subset of psychopathic persons. This possibility invites closer examination from a responsibility theory perspective.

Other responsibility-related questions are also raised, however, extending beyond the mental disorder defence. One concerns whether the mental disorder *defence* is the appropriate focus for this enquiry. If a subset of psychopaths could succeed with this defence on capacity-based grounds, an issue is that the incapacity in question is a "normal" state of affairs for these persons as it is a persisting feature of a *personality* disorder; it is not a transient deviation from the norm, such as a manic episode in bipolar disorder, that might temporarily vitiate responsibility. Given this issue, perhaps fitness to plead is a more apt focus than the mental disorder defence: rather than stand trial, perhaps the relevant subset of psychopaths should be diverted, pre-trial, towards hospital-based treatment.[117]

Further responsibility-related questions raised concern the management of psychopaths falling short of "insanity" but with significantly impaired capacity. If psychopathy is dimensional in nature, this could be a much larger group than the extreme subset considered above. In this case "defences" might be an appropriate focus, but an issue is that there is no *general* defence of diminished responsibility or capacity in Scots law. As with England and Wales, diminished responsibility is only available as a defence to a murder charge. Currently, impaired capacity can be a mitigating factor at a sentencing stage; the possible existence of a large group of offenders with diminished capacity, however, raises questions about the appropriateness of this approach. This issue has been explored with respect to mental disorders more generally,[118] but perhaps should be examined further from the specific perspective of psychopathy.

Finally, the possibility that responsibility *theory*-related arguments could justify success with a mental disorder defence for some psychopaths should encourage greater discussion of relevant *non*-responsibility related concerns. Perhaps there are good reasons for a blanket exclusion *even if* responsibility-based arguments suggest that a subgroup should be granted access to a defence. Public confidence, for example, might be lost in the criminal justice system if such "obviously bad" persons were to succeed with pleas, or there is a realistic concern that psychopaths could use their manipulative talents to secure early release from hospital if

[117] Under s.57 of the CPSA.
[118] e.g. J Horder, "Pleading involuntary lack of capacity" (1993) 52 Cambridge Law Journal 298.

detained there following a successful plea.[119] If these concerns are not discussed openly, they may influence policy covertly (e.g. by helping to motivate an oversimplified analysis of psychopathy).

[119] Under s.57 of the CPSA. For discussion of these and other "consequentialist" concerns, in a U.S. context, see Litton (fn.116).